

In the Supreme Court of the United States

OCTOBER TERM, 1990

ENVIRONMENTAL PROTECTION AGENCY, PETITIONER

v.

STATE OF OKLAHOMA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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Respondents' brief in opposition does not provide a persuasive reason for denying our petition for a writ of certiorari.¹ Respondents claim that the

¹ The brief in opposition also discusses the Arkansas petition for a writ of certiorari, *Arkansas v. Oklahoma*, No. 90-1262, which seeks review of the same judgment. We do not oppose the granting of that petition.

Despite the caption of the Arkansas petition, this case is not within the exclusive original jurisdiction of this Court under 28 U.S.C. 1251 (a). As we explain in our petition (Pet. 9), this case originated in three petitions to the courts of appeals for review of EPA's issuance of a permit for the Fayetteville wastewater treatment plant. In each case, the State was joined as petitioner by other governmental entities, and EPA was the respondent. When the cases were consolidated in the Tenth Circuit, the States remained petitioners in

court of appeals' decision is limited to the application of a particular Oklahoma Water Quality Standard (OWQS) to the upper reaches of the Illinois River, and thus presents "no focused issue of general significance" meriting review by this Court (Br. in Opp. 16). Respondents also assert that the issue is of limited importance because the permit at issue here is subject to renewal, and the OWQS to periodic review (*id.* at 25-26). Neither of these contentions has merit.

1. In arguing that the decision below is of limited significance because it simply applies a particular provision of the Oklahoma Water Quality Standards to the Fayetteville discharges, respondents overlook the importance of the fundamental question in this case—whether it is, indeed, the proper role of the court reviewing the validity of EPA's action to base its decision on the court's own interpretation of the antidegradation provision as simply a matter of state law, or whether, as we contend, the court should uphold the validity of EPA's administrative action if EPA's interpretation of the antidegradation provision was reasonable. We explain in our petition (Pet. 15-19, 22-23) the serious implications of the court of appeals' approach for the implementation of the Clean Water Act, and particularly its effect on EPA's

both cases, and EPA remained the respondent. There was accordingly no doubt that the court of appeals had jurisdiction of the case under 33 U.S.C. 1369(b) (1) (providing that review of EPA action in issuing NPDES permit "may be had by any interested person in the [appropriate] Circuit Court of Appeals of the United States.") and 33 U.S.C. 1362(5) (defining "person" to include a State). Since this suit did not originate as a "controvers[y] between two or more States," it is not within the exclusive original jurisdiction of this Court; the Court accordingly has appellate jurisdiction under 28 U.S.C. 1254(1).

responsibilities to facilitate the resolution of interstate water pollution disputes. Our petition also points out (Pet. 15-16) the fundamental inconsistency between the court of appeals' holding and this Court's decision in *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987).

Respondents assert that EPA's present position concerning the deference due to its interpretation of the federally approved standards is "at odds with" its position in the administrative proceedings (Br. in Opp. 21-22). There is in fact no inconsistency between the position that federally approved downstream state standards must be strictly complied with—the position taken by EPA in the administrative proceedings—and the contention in our petition that the reviewing court must uphold EPA's permitting action when it is based on a reasonable interpretation of those standards. The distinction is between determining the requirements of the standards—a matter as to which deference is due the expertise of the agency that approved them—and assuring strict compliance with those standards once their meaning has been ascertained.

Respondents also suggest (Br. in Opp. 22) that deference is inappropriate because the OWQS are clear and unambiguous.² Respondents argue (*id.* at 24, 11) that degradation in violation of the OWQS occurs whenever "it is determined that harmful pollutants are added to the river by a new discharge." But, as Arkansas notes in its reply brief, the small amount of additional phosphorus in the Illinois River at the border is accompanied by a proportionally

² As we note in our petition (Pet. 10, 18), the court's interpretation was not proposed by any party below. Respondents do not dispute this; they simply assert that the standard was unambiguous.

larger increase in the water flow in the river, and testimony at the hearings on the Fayetteville permit indicated that the quality of the Fayetteville effluent actually exceeds the quality of the Illinois River in Oklahoma. Ark. Reply Br. 9-10. This evidence means that the concentration of phosphorus and other pollutants in the river at the border will be lower with than without the Fayetteville discharge. It is accordingly not at all obvious that permitting such discharge results in a violation of Oklahoma's federally approved antidegradation provision. In any event, and particularly on this state of the record, it was reasonable for EPA to conclude that Oklahoma did not, by enacting a provision that simply prevents "degradation," foreclose issuance of a permit for a discharge into upstream Arkansas waters where the discharge would not cause any injury to Oklahoma waters. EPA, accordingly, properly exercised its federal statutory authority in issuing the permit.

2. Respondents also claim (Br. in Opp. 16, 25-26) that certiorari should not be granted in this case because renewal of the Fayetteville permit is presently being considered by the Arkansas Department of Pollution Control and Ecology, which has assumed NPDES permitting responsibilities. But the court of appeals' decision rested, in substantial part, on its view of the constraints imposed by the Clean Water Act on EPA's interpretation of the OWQS—and presumably on the interpretation of any other similarly worded water quality standard.³ The decision in this case, if unreviewed, thus will presumably limit the options available in subsequent permitting proceed-

³ As we noted in our petition (Pet. 16-17), Oklahoma's antidegradation provision substantially reflects the model standard promulgated by EPA. It is thus fairly typical of antidegradation provisions in other States.

ings, whether conducted by EPA itself or by the State subject to EPA's authority to object to a state-proposed permit. See Br. in Opp. 25 ("the Court of Appeals' decision establishes the law to be applied in such subsequent proceedings").

Although state water quality standards are subject to periodic review by EPA, that review may well be similarly cabined by the decision below, absent review by this Court. And, of course, the fact that state standards undergo periodic review by EPA hardly diminishes the importance of assuring that courts reviewing permitting decisions pay proper deference to EPA's reasonable interpretations of those standards. Significantly, respondents do not suggest that any changes made in the course of these reviews have materially changed the meaning of the state anti-degradation provision, or that any such changes are contemplated.⁴

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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⁴ NPDES permits are always of limited duration and state water quality standards are always subject to periodic review. Respondents suggest (Br. in Opp. 25) that these factors make the issues presented too "narrowly limited by place and time" to merit review by this Court. Under that rationale, issues involving the interpretation and application of the Clean Water Act to the NPDES permitting process would rarely, if ever, merit such review.